

1997

Provo City Corp. v. William Patton : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

PROVO CITY CORP.
A Municipal Corporation
Plaintiff/Appellee

vs.

WILLIAM PATTON
Defendant/Appellant

Case No. 970489-CA

Case Priority: 2

BRIEF OF APPELLANT WILLIAM PATTON

APPEAL FROM THE FOURTH DISTRICT COURT, PROVO DEPARTMENT
JUDGE GARY D. STOTT

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**UTAH COURT OF APPEALS
BRIEF**

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DOCKET NO. 970489-CA

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COURT OF APPEALS

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STATEMENT OF JURISDICTION

U.C.A. 78-2a-3(2)(1953 as amended) states as follows:

The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(e) appeals from a court of record in criminal cases, except those involving a conviction of a first degree or capital felony.

This Appeal is taken from a conviction of Appellant of a Class B Misdemeanor in the Fourth District Court, Provo Department, Judge Gary D. Stott presiding.

ISSUES PRESENTED FOR APPEAL

I. Did the prosecution have a duty to provide Defendant with a list of all witnesses prior to trial? This is a question of law subject to de novo review by the Court of Appeals for correctness. State v. Pena, 869 P.2d 932, 936 (1994). This issue was raised as an objection at trial (Trial Transcript, pages 62-66)(Transcripts are in the companion case of Provo City v. Joan Patton, Court of Appeals Case No. 970490-CA) and in Defendant's Motion for New Trial and Motion for Arrest of Judgment (Trial Record Index, pages 31-33).

II. Did the Trial Court error in overruling Defendant's objection to introduction of the surprise testimony of Roger Gonzales, and in denying Defendant's post-trial motions so prejudice Defendant's case as to undermine confidence in its validity and warrant reversal? This is a question of law subject to de novo review by the Court of Appeals for correctness. State v. Pena, 869 P.2d 932, 936 (1994). This issue was raised as an objection at trial (Trial Transcript, pages

62-66) and in Defendant's Motion for New Trial and Motion for Arrest of Judgment (Trial Record Index, pages 31-33).

**RELEVANT STATUTES, ORDINANCES, RULES, AND CONSTITUTIONAL
PROVISIONS**

1. Rule 16, Utah Rules of Criminal Procedure:

(a) Except as otherwise provided, the prosecutor shall disclose to the defense upon request the following material or information of which he has knowledge:

(1) relevant written or recorded statements of the defendant or co-defendants;

(2) the criminal record of the defendant;

(3) physical evidence seized from the defendant or co-defendant;

(4) evidence known to the prosecutor that tends to negate the guilt of the accused, mitigate the guilt of the defendant, or mitigate the degree of the offense for reduced punishment; and

(5) any other item of evidence which the court determines on good cause shown should be made available to the defendant in order for the defendant to adequately prepare his defense.

(b) The prosecutor shall make all disclosures as soon as practicable following the filing of charges and before the defendant is required to plead. The prosecutor has a continuing duty to make disclosure.

(e) When convenience reasonably requires, the prosecutor or defense may make disclosure by notifying the opposing party that material and information may be inspected, tested or copied at specified reasonable times and places.

(g) If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances.

2. Rule 30(a), Utah Rules of Criminal Procedure:

Any error, defect, irregularity or variance which does not affect the substantial rights of a party shall be disregarded.

3. Section 14.34.080(3):

No trash, used materials, junk, household furniture, appliances, scrap material, equipment or parts thereof shall be stored in an open area.

STATEMENT OF THE CASE

Defendant Bill Patton and co-defendant, Joan Patton, were served with summons on May 31, 1996, charging that on March 19, 1996, both defendants had abandoned, wrecked or junked vehicles, or miscellaneous materials in their yard, in violation of Provo City Ordinance 14.34.080. (Trial Index, pages 2-4). Arraignment was held on December 4, 1996, in the Fourth District Court, Provo, Hon. Fred D. Howard presiding (Trial Index, pages 5-7; Trial Transcript, pages 1-6), and Pretrial was held before Judge Howard on January 30, 1997. (Pretrial Transcript, pages 1-15). Trial was held on May 19, 1997, before Hon. Gary D. Stott, and defendants were convicted of violating the ordinance, a Class B Misdemeanor. The court disregarded all evidence as to abandoned, wrecked or junked vehicles, but specifically found that defendants had other materials in their yard. (Trial Transcript, pages 114-116, 120-121). Sentencing was held before Judge Stott on June 23, 1997, at which time both defendants presented Motions for New Trials and Motions for Arrest of Judgment. (Trial Index, pages 31-33; Sentencing Transcript, pages 1-7). These motions were denied on August 4, 1997. (Trial Index, page 42). Notice of Appeal was timely filed. (Trial Index, pages 41, 61, 66).

RELEVANT FACTS

Extensive discovery was conducted prior to trial by the defendants. Beginning at arraignment and continuing throughout preparation for trial, Defendant was told by the city attorney that Defendant would be provided with all information in the prosecutor's file. (Transcript of Arraignment Hearing, page 5). At Pretrial, the city attorney, Gary McGinn, assured the Court and Defendant's counsel that all matters in the city's file would be provided to the defendants. At that time the city's main witness, Anthony Malloy, in the presence of Mr. McGinn, told the defendants and counsel that he would be the only witness for the city, and that he had taken all relevant photos. Malloy had also made written statements to Mr. McGinn, prior to the filing of the complaint stating that he, Malloy, had taken all relevant photos. (Transcript of Sentencing Hearing, page 3). This document was provided to defendants in the course of discovery. Defendant prepared his defense based upon a thorough inspection of the city attorney's file, and on the statements made by both the city attorney and Mr. Malloy. In none of the materials received by Defendants prior to trial and in no conversations with either the city's attorneys nor Mr. Malloy was the Appellant ever informed that the City intended to call a Roger Gonzales as a witness. (Trial Transcript, pages 64-65).

At trial on May 19, 1997, contrary to his prior written and verbal statements, Mr. Malloy stated that Roger Gonzales had taken the relevant photos that the city submitted as evidence. (Trial Transcript, page 14). The city then proceeded to call Roger Gonzales as a witness.

Appellant objected to the admission of Mr. Gonzales' testimony inasmuch as they were entirely unprepared to cross-examine him on any matter, having relied on the City's representations regarding the contents of the City's file and the source of the photos. Appellant's objection was overruled upon the court's finding that Appellant had not filed an explicit written request for a list of witnesses. (Trial Transcript, pages 64-66). Mr. Gonzales was the sole witness able to testify as to any specific items in the Appellant's yard that might have constituted garbage on March 19, 1996. (Trial Transcript, pages 68-74). In ruling against the Appellant, the Court found insufficient evidence as to any matter testified to by Mr. Malloy and also as to any matter alleged to be shown in the photos, but specifically found that there was garbage in the yard on March 19, 1996. (Trial Transcript, pages 114-116, 120-121).

At sentencing on June 23, 1997, Appellant presented a Motion for Arrest of Judgment and a Motion for New Trial, based on the Court's error in admitting the testimony of Mr. Gonzales. Both Motions were ultimately denied on August 4, 1997. (Trial Index, page 42).

SUMMARY OF ARGUMENTS

I. When discovery is voluntary, the prosecution has an affirmative duty to provide the defense with any inculpatory evidence prior to trial, including any witnesses the prosecution intends to call. Under these circumstances, the defense does not have to make a formal, specific request. The prosecution also has a duty not to mislead the defense. In this case, Provo City failed to provide the Defendant, William Patton, with a list of witnesses and made several written

and verbal representations that misled the defense into believing that Anthony Malloy would be the city's sole witness. This constituted error on the city's part, compounded when the court erroneously ruled that the city had no duty to provide the defense with a witness list.

II. Defendant timely objected to allowing the surprise witness, Roger Gonzales, to testify at trial, and repeated those objections in post-trial motions. Inasmuch as the prosecution had erred in failing to notify the defense of its intent to call Mr. Gonzales, the court erred under Rule 16(g) and Rule 30 of the Rules of Criminal Procedure in failing to exclude Mr. Gonzales' testimony and failing to grant Defendant's post-trial motions. The court's error in admitting Mr. Gonzales' surprise testimony completely prejudiced Defendant's case. Defendant was unable to prepare to meet the testimony. The evidence is ample that the defendants thoroughly prepared for such evidence as they were apprised of in discovery. The entire conviction was based solely on the testimony of the surprise witness. The court therefore erred in admitting this testimony, and further erred in refusing to grant a new trial or arrest of judgment. The error was thus sufficient to undermine confidence in the validity of the proceeding and provides ample cause for reversal.

ARGUMENT

I

THE PROSECUTION HAD A DUTY TO PROVIDE DEFENDANT WITH A LIST OF ALL ANTICIPATED WITNESSES PRIOR TO TRIAL.

Discovery in a criminal case is governed by Rule 16 of the Rules of Criminal Procedure, which states in pertinent part as follows:

(a) Except as otherwise provided, the prosecutor shall disclose to the defense upon request the following material or information of which he has knowledge:

(1) relevant written or recorded statements of the defendant or co-defendants;

(2) the criminal record of the defendant;

(3) physical evidence seized from the defendant or co-defendant;

(4) evidence known to the prosecutor that tends to negate the guilt of the accused, mitigate the guilt of the defendant, or mitigate the degree of the offense for reduced punishment; and

(5) *any other item of evidence which the court determines on good cause shown should be made available to the defendant in order for the defendant to adequately prepare his defense.* (emphasis added)

(b) The prosecutor shall make all disclosures as soon as practicable following the filing of charges and before the defendant is required to plead. The prosecutor has a continuing duty to make disclosure.

(e) When convenience reasonably requires, the prosecutor or defense may make disclosure by notifying the opposing party that material and information may be inspected, tested or copied at specified reasonable times and places.

In a case such as Defendant's, where the specific evidence requested does not fit any of the detailed descriptions in subsections (a)(1) through (a)(4), which mandate disclosure upon request, subsection (a)(5), the catch all provision, applies. While the wording of subsection (a)(5) might suggest that it requires disclosure of the material sought only to the extent ordered by the court, the law is clearly established that when the prosecution chooses to respond voluntarily to a request under subsection (a)(5) without requiring the defense to obtain a court order, the prosecution cannot respond in a manner that it is misleading. State v. Knight, 734 P.2d 913, 916 (Utah 1987). In fact, the aspect of "good cause . . . which the court determines" applies only in cases where the prosecution explicitly refuses to provide discovery and the defense must compel discovery by order of the court. Salt Lake City v. Reynolds, 849 P.2d 582, 585 (Utah App.

1993). This duty to provide discovery is ongoing. State v. Carter, 707 P.2d 656, 662 (Utah 1985); State v. Knight, 734 P.2d 913, 917 (Utah 1987); State v. Begishe, 937 P.2d 527, 530 (Utah App. 1997); Rule 16(b), Rules of Criminal Procedure. This is especially so when discovery is voluntary. State v. Kallin, 877 P.2d 138, 142 (Utah 1994).

When discovery is voluntary, the prosecution has an affirmative duty not to mislead the defense, and specifically to provide inculpatory evidence. State v. Begishe, 937 P.2d at 532. In Begishe the defense's opening statement at trial, based on pre-trial discovery, was that the prosecution had no tangible evidence linking the defendant to the alleged rape of a child. After the trial had begun, the prosecutor attempted to discredit this statement by sending the alleged victim's panties to the crime lab for additional testing. The defendant's only opportunity to counter the evidence was through frantic efforts between trial sessions. 937 P.2d at 529. In Salt Lake City v. Reynolds, the city failed to completely respond to the defendant's discovery request, but also failed to inform the defense that it was refusing to provide all requested information. The defense did not attempt to compel discovery because the prosecution's conduct had misled them to believe they had no reason to do so. 849 P.2d at 585. In State v. Knight, the prosecution offered to provide all discovery voluntarily under an "open file" policy. The defense specifically inquired as to certain witnesses and was repeatedly assured that they would not be called at trial. Nevertheless, on the day of trial, those witnesses were called. The defense had no opportunity to prepare and was misled into preparing a trial strategy different from what the situation demanded.

734 P.2d at 916. This is particularly parallel to the situation in the present case. At arraignment, the prosecution declared that it would provide all discovery materials to the defendants. (Arraignment transcript, page 5). At pretrial, the city attorney, Gary McGinn, reaffirmed his intention to provide the defense with all materials in the file (Sentencing transcript, pages 3-5), and at trial he was adamant that he had done so. (Trial transcript, page 64). The discovery materials provided to both defendants contained no witness list whatsoever. They did, however, contain a memorandum from the city inspector, Anthony Malloy, to Mr. McGinn stating that Malloy had taken all the relevant photos. Consistent with this document, and in response to the direct question at pretrial of both Mrs. Patton and Mr. Humiston as to who the city's witnesses would be, both Mr. Malloy and Mr. McGinn clearly represented that Mr. Malloy would be the only witness. (Sentencing transcript, pages 3-5). The defense thus had no indication that any other witnesses would be called and no reason to inquire any further.

While the defense has a duty to pursue discovery diligently (State v. Kallin, 877 P.2d 138, 143 [Utah 1994]), an inadequate response by the prosecution will logically lead the defense to infer that there is no further information. Salt Lake v. Reynolds, 849 P.2d at 582.

When Roger Gonzales was presented as a witness at trial, both defendants objected vehemently. (Trial transcript, pages 62-66). The court ruled, however, that the city had no obligation to notify the defense of the city's intention to call Mr. Gonzales, as the record contained no specific request for witnesses. (Trial transcript, pages 65-66). As is clear from

Knight and the numerous related cases, there was no need for a specific request for a witness list, and the prosecution had a positive duty not to mislead the defense. The court's ruling was thus clearly incorrect, and the conduct of the prosecution was improper.

II

THE TRIAL COURT ERROR IN ADMITTING GONZALES' SURPRISE TESTIMONY SO PREJUDICED DEFENDANT'S CASE AS TO UNDERMINE ALL CONFIDENCE IN THE VALIDITY OF THE TRIAL AND WARRANTS REVERSAL.

The court broad discretion in remedying abuses of discovery. State v. Pena, 869 P.2d 932, 938 (1994). Rule 16 of the Rules of Criminal Procedure states:

(g) If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances.

However, the "effective administration of justice requires that discoverable evidence be provided much sooner than 'moments' before trial." State v. Begishe, 937 P.2d at 532.

Rule 30(a) provides:

Any error, defect, irregularity or variance which does not affect the substantial rights of a party shall be disregarded.

When it is clear, as it is here, that the defense had exercised all reasonable diligence in discovery and properly preserved all objections, the two questions the court must answer are whether admission of the surprise testimony was error, and whether that error was prejudicial.

State v Knight, 734 P 2d at 916 It has already been clearly established that allowing the testimony was error, and the sole question remaining is whether that error was sufficiently prejudicial to warrant reversal State v Carter, 707 P 2d 656, 662 (1985)

An error is prejudicial if there is a reasonable likelihood that, but for the error, the defendant would have obtained a more favorable result at trial Knight, 734 P 2d at 919 A “reasonable likelihood” is a probability sufficient to undermine confidence in the outcome of the trial Horrell v Utah Farm Bureau Ins Co, 909 P 2d 1279, 1282 (Utah App 1996) The quantum of probability required to undermine confidence falls far short of “more probable than not” Knight, 734 P 2d at 920 State v Jacques, 924 P 2d 898, 902 (Utah App 1996) Indeed, when the defendant can make a credible argument that the prosecutor’s errors have impaired the defense, the burden of proof shifts to the prosecution to show that the error was harmless Knight, 734 P 2d at 921, State v Bell, 770 P 2d 100 (Utah 1988)

In Defendant’s case, it is clear that Gonzales’ testimony was severely prejudicial Three witnesses testified at trial Anthony Malloy, Roger Gonzales, and Brent Keller The bulk of Mr Malloy’s testimony regarded abandoned and junked vehicles (Trial Transcript, pages 26 through 56) As a result of discovery, the defendants had opportunity to prepare for this testimony, as is clear from the extensive questions asked by Mrs Patton *Id.* As a result, the court rejected virtually all of Mr Malloy’s testimony, and specifically found that there was insufficient evidence on the issue of junked vehicles (Trial transcript, pages 114-115) While Mr Malloy did testify

vaguely as to “junk” in the yard, upon repeated cross-examination he could not specify what that “junk” consisted of. (Trial transcript, pages 24, 44-45, 62) Indeed, he openly stated, “I do not recall specifics”, *Id.* at 24, and “I do not recall specifically what was in the front yard area”, *Id.* at 62. Mr. Keller did not testify as to any items in the Patton’s yard. *Id.* at 87-99. Mr. Gonzales, however, testified very specifically as to “wood and lumber scraps” in the yard. *Id.* at 68-74. He also testified, contrary to the written and verbal statements provided in discovery, that he had taken all the relevant photographs. *Id.* at 67-68.

In contrast to the examination of Mr. Malloy, Mrs. Patton was completely unprepared to ask Mr. Gonzales any questions, as the court specifically noted. (Trial transcript, pages 70-71, Mr. Humiston: “I’m going to question him on behalf of Mrs. Patton, but I guess she doesn’t have any questions prepared because we did not know about this witness”, The Court: “I want the record to reflect that”). Mr. Humiston examined Mr. Gonzales as best he could, being equally unprepared. *Id.*, pages 71-74. It is significant that in the end the court found the testimony regarding junked vehicles, which was the bulk of Mr. Malloy’s testimony, inconclusive. *Id.* page 114. It also disregarded all of the photographs. *Id.* pages 114-115. The court found only that there was trash, specifically firewood, in the yard, and this was a matter that only Mr. Gonzales had testified to. *Id.*, pages 115-116. The court was very specific in limiting its finding to the trash. *Id.* pages 120-121

Had the defense had any notice whatsoever of the city's intention to call Mr. Gonzales, it could have adequately prepared to address his testimony. Unfortunately, none of the matters on which Mr. Gonzales would have been questioned appear in the record, as the defense did not have that opportunity. If the nature of an error prevents the court from clearly determining the effect of the error, the burden is upon the prosecution to show that the error was harmless. State v. Bell, 770 P.2d 100, 106 (Utah 1988). Clearly, the city cannot do so in this case.

In determining whether a witness' testimony is sufficiently prejudicial to require reversal, a *number of factors must be considered*:

1. The importance of the witness to the prosecution's case;
2. Whether the testimony is cumulative;
3. The presence or absence of corroborating or contradicting testimony;
4. The extent of cross-examination; and
5. The overall strength of the case.

State v. Jacques, 924 P.2d 898, 902 (Utah App. 1996); State v. Hackford, 737 P.2d 200 (1987)


It is clear that Mr. Gonzales' testimony was crucial to the city's case. There was no specific testimony regarding trash other than his testimony, and virtually no corroborating evidence. Cross-examination was limited by the element of surprise, and all other evidence other than Mr. Gonzales' testimony was disregarded by the judge.

It is thus clear that the court erred in allowing Mr. Gonzales to testify, and that error requires reversal.

CONCLUSION

The trial court committed error in permitting the city's surprise witness, Roger Gonzales, to testify. This error so prejudiced Defendant's case as to undermine all confidence in the outcome of the trial, as there is a high likelihood that but for this error, Defendant would have prevailed at trial. Defendant William Patton's conviction of violating Provo City Ordinance 14.34.080 should therefore be reversed and remanded for a new trial.

DATED this 2nd day of February 1998

A handwritten signature in black ink, appearing to read "Michael L. Humiston", written over a horizontal line.

Michael L. Humiston
Attorney for Appellant William Patton

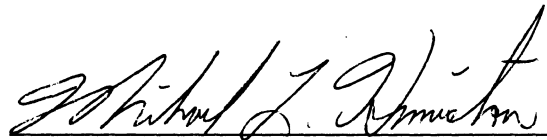
CERTIFICATE OF SERVICE

I hereby certify that pursuant to Rule 27 of the Utah Rules of Appellate Procedure, I mailed two copies of the attached Brief of Appellant to each of the following this 2nd day of February, 1998:

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1 MR. ROMNEY: Your Honor, actually it's Mr.
2 McGinn's case. He handles the zoning portion matters,
3 but I don't think very long.

4 THE COURT: Is that going to be adequate
5 time with that pre-trial? Could it be mailed to them?

6 MR. ROMNEY: Sure. I'll just ask Mr. McGinn
7 to send them discovery. We know the address.

8 THE COURT: Would that be adequate, Ms.
9 Patton? I'll have them mail you a copy of the
10 materials they have, and I think they can get that
11 done before this date. And then we'll come back on
12 the pre-trial conference date for further discussion.
13 That would not be a trial date, that would just be a
14 date to discuss the case to see what we can do about
15 it. Would that be agreeable with you?

16 MS. PATTON: Yes. May I also have it read
17 into the record, then, that in the event that I choose
18 to represent myself, may I speak for Mr. Patton as
19 well?

20 THE COURT: Ordinarily you may not, because
21 that's a practice of law. But we'll see what we can
22 do -- we may not get to that point, so let's see what
23 can be done at the pre-trial, okay?

24 MS. PATTON: All right.

25 THE COURT: Anything else, Mr. Romney?

1 letter?

2 A. The notice states the specific ordinances
3 which they are in violation of, describes what will
4 need to happen in order for compliance to be met, and
5 I notified them on that that if they did not contact
6 me within a specific time frame that the file would be
7 forwarded to the city attorney's office for legal
8 proceedings.

9 Q. At that point what did you do next?

10 A. That was mailed March 11th. I did not
11 receive a response, and on March 19, 1996 I went out
12 to the site once again with another zoning officer,
13 Roger Gonzalez, in order to take photos that would
14 document the specific violation that I was preparing
15 to send to your office -- to the city attorney's
16 office for legal proceedings.

17 Q. And that was what date again?

18 A. That was March 19th. March 20, 1996 I sent
19 a letter to William and Joan Patton informing them
20 that the file had been sent to the city attorney's
21 office for legal action.

22 I neglected -- I'm sorry, and can I add
23 something?

24 THE COURT: Go ahead.

25 THE WITNESS: I neglected to mention that

1 look at what's been marked as City's Exhibit No. 1.
2 Do you recognize that photo?

3 A. I do.

4 Q. What is that a photo of?

5 A. This is a photo of the house that according
6 to the Utah County Recorder's Office is owned by
7 William and Joan Patton.

8 Q. When was that photo taken?

9 A. It was taken on March 19, 1996.

10 Q. Who took that photo?

11 A. Actually Roger Gonzalez took that photo.

12 Q. Were you with him at the time that photo was
13 taken?

14 A. I was with him.

15 Q. Does that photo accurately and fairly
16 represent the state of the property on that date,
17 March 19, 1996?

18 A. It does.

19 MR. MCGINN: Your Honor, may I approach the
20 witness again?

21 THE COURT: Yes, sir.

22 Q. BY MR. MCGINN: I'm handing you what's been
23 marked as Plaintiff's Exhibit No. 2. What is that?

24 A. This is another photo of the property owned
25 by William and Joan Patton, taken March 19, 1996.

CROSS EXAMINATION

BY MS. PATTON:

Q. Mr. Malloy, what vehicles are in violation of the ordinance?

A. Specifically on that date? On the subject lot that we're discussing today there is a trailer parked in the front yard area that is, in my opinion, was inoperable, and violates Section 14-34-080.

Q. And that's the only vehicle that you find in violation?

A. On this lot at this time, that is correct.

THE COURT: When you say, "this time," what time frame are you talking about?

THE WITNESS: I believe we're addressing March 19th, is that right, or are we discussing today?

THE COURT: No, that's correct. That should be the date you're speaking of.

THE WITNESS: It was.

Q. BY MS. PATTON: Is the vehicle wrecked?

A. In my opinion it was inoperable and unlicensed.

Q. Is there a definition of a wrecked vehicle or an unlicensed vehicle (inaudible) city code?

A. I'm not sure if there is or not.

Q. Is there a definition of a wrecked vehicle

1 in the state code?

2 A. I'm not sure.

3 Q. Is there a definition of a wrecked vehicle
4 in the policy and procedure of -- for your department?

5 A. In Section 14-34-080 it does describe
6 certain vehicles that would be considered a violation
7 of that section of the ordinance.

8 Q. (Inaudible).

9 A. 14-34-080.

10 Q. Did you check to see if there was an
11 accident report filed on this vehicle?

12 A. I did not.

13 Q. Do you know if there's an accident report on
14 file for this vehicle?

15 A. I do not.

16 Q. Was there a report from a garage or a body
17 shop that this vehicle was in for repairs and did not
18 have a accident damage sticker?

19 A. I do not recall if I received any.

20 Q. Is it a subjective judgment by the zoning
21 officer as to whether the vehicle was wrecked?

22 A. I do not believe so. If it's inoperable
23 that is evident -- it has flat tires that are on the
24 vehicle for a period of one year or several months,
25 then I would say it pretty well indicates that it's

1 inoperable. If it's unlicensed -- if it's licensed
2 then there should be tags on the vehicle showing that
3 it is licensed.

4 Q. Is there an occasion for one zoning officer
5 when they find a vehicle wrecked (inaudible) another,
6 both find the same vehicle to (inaudible) is there an
7 occasion where one zoning officer may find a vehicle
8 wrecked while another will not find the same vehicle
9 to be wrecked?

10 A. I can only account through how I would
11 visually see it, but I can't answer for somebody else.

12 Q. Is the vehicle junked?

13 A. I would say it's inoperable.

14 Q. Is there a definition of a junked vehicle in
15 the city code?

16 A. I do not know if there is.

17 Q. Is there a definition of a junked vehicle in
18 the state code?

19 A. I do not know if there is.

20 Q. Is there a definition of a junked vehicle in
21 your department's policy and procedure?

22 A. I do not know if there is other than what is
23 described in Section 14-34-080.

24 Q. Does faded paint make a vehicle a junk
25 vehicle?

1 A. Alone they may not be a violation.

2 Q. Does a missing molding make a vehicle a
3 junked vehicle?

4 A. I guess it would depend upon how extensive
5 what was missing.

6 Q. Does a dingy look make a vehicle a junk
7 vehicle?

8 A. I would say no.

9 Q. Does something have to be unusable to be
10 junked?

11 A. According to this section of the ordinance
12 when describing vehicles, it does not just reference
13 junked vehicles, it says inoperative, dismantled,
14 partially dismantled, unlicensed, et cetera.

15 Q. Is it a subjective judgment by the zoning
16 officer as to whether the vehicle is junked?

17 A. If I'm assessing whether or not it's
18 inoperable or junked, then I would say, yes, it is
19 subjective to an extent. But if it's inoperable then
20 it would be obvious to me or other people I would
21 imagine. But once again, I cannot answer how somebody
22 else would see something.

23 Q. Is there an occasion where one zoning office
24 may find a vehicle junked while another will not find
25 the same vehicle to be junked?

1 A. I think I answered that, and I couldn't
2 answer how somebody else would see something.

3 Q. Is the vehicle partially dismantled?

4 A. Is the vehicle partially dismantled?

5 Q. The trailer we're talking about.

6 A. I cannot see what's in the back of the
7 trailer. When we were just meeting on Friday I did
8 point out, too, that the vehicle was -- well, last
9 Monday that it wasn't -- did not have tags that I
10 could see showing it was licensed, and it did not have
11 tires that -- you know, that they could be used, it
12 had flat tires.

13 Q. Is there a definition of partially
14 dismantled in the city code?

15 A. I'm not aware if there is or not.

16 Q. Is there a definition of partially
17 dismantled in the state code?

18 A. I'm not aware if there is or not.

19 Q. Is there a definition of partially
20 dismantled in your department's policy and procedure?

21 A. I'm not aware if there is or not.

22 Q. Did you verify that this vehicle was
23 dismantled in accordance with the state code?

24 A. I did not.

25 Q. Did you verify that there was a license to

1 dismantle, as required by state code?

2 A. I did not. What I filed on (inaudible) was
3 a violation of Section 14-34-080, which would include
4 not only that the vehicle is dismantled, but also that
5 it is inoperative, not licensed. Any one of those
6 issues would be a violation of that section of the
7 ordinance, and require the vehicle to either be moved
8 off the lot or placed behind the fence or in a
9 building, not in the front yard set back.

10 Q. Did you inform public safety officers or the
11 prosecutor attempting to dismantle a vehicle without
12 proper license may be violated?

13 A. I did not.

14 Q. Can a vehicle be operable and partially
15 dismantled?

16 A. With this specific vehicle I would say that
17 it would be hard to operate it with flat tires.

18 Q. How many flat tires did you see?

19 A. I believe I -- if I recall correctly there
20 were two.

21 Q. Did you verify whether the Pattons were
22 operating this vehicle?

23 A. Prior to March 19th or as of this date, no,
24 I did not.

25 Q. As of this date.

1 A. I did not. I had not received any personal
2 contact with you at that point in time, nor had I
3 tried to initiate physical contact because of the sign
4 that is posted on your property that informs agents --
5 that informs local agencies and representatives to not
6 enter your property.

7 Q. Is it a subjective judgment by the zoning
8 officer, such as yourself, as to whether the vehicle
9 is partially dismantled?

10 A. I would say that in part that may be the
11 fact, but again, it would be quite objective as far as
12 being able to see visually whether it is dismantled or
13 not.

14 Q. Is the vehicle inoperable?

15 A. I would say, yes, it is.

16 Q. Is there a definition of inoperable in the
17 city code?

18 A. I'm not aware if there is or not.

19 Q. Is there a definition of inoperable in the
20 state code?

21 A. I'm not sure whether there is or not.

22 Q. Is there a definition of inoperable in your
23 department's policy and procedure?

24 A. I'm not sure whether there is or not.

25 Q. Are you aware of whether or not Provo City

1 has adopted certain state codes into the city code in
2 their entirety?

3 A. I'm not sure whether they have or not.

4 Q. Are you familiar with this book?

5 A. I am.

6 MS. PATTON: May I approach, your Honor?

7 THE COURT: You may.

8 Q. BY MS. PATTON: Would you please identify
9 and read the first marked passage on the following
10 page, 942, "Provisions of the Motor Vehicle Act
11 Adopted," please, right there.

12 MR. MCGINN: Your Honor, objection,
13 relevancy. I'm not following the relevancy of this.

14 THE COURT: You're asking him to read--

15 MS. PATTON: Just one paragraph, your Honor.

16 THE COURT: And cite again what you're
17 asking him to read.

18 MS. PATTON: I'm asking him to read on page
19 942-010, "Provisions of the Motor Vehicle Act
20 Adopted."

21 THE COURT: That is not 14-34-080?

22 MS. PATTON: No, it is not.

23 THE COURT: Would you address, please, the
24 objection with respect to relevancy then? Ms. Patton,
25 the objection on relevancy.

1 MS. PATTON: If you'll just give me a little
2 leeway, your Honor, I can tie all this in.

3 THE COURT: Well, I'll give you all the
4 leeway that you need, but you'll comply with the rules
5 just like Mr. Humiston has to comply with them. And
6 we have an objection to the question on relevancy, and
7 I'm asking you to demonstrate and tell me why it's
8 relevant, and if it's not relevant he doesn't have to
9 answer it. If it is relevant he does have to answer
10 it.

11 MS. PATTON: According to my perception,
12 which may not always be good, your Honor, it's my
13 understanding that Provo City adopted this ordinance
14 into their code from the State.

15 THE COURT: Read what she's asked you to
16 read.

17 THE WITNESS: The title for this section is
18 "Police Ordinances, Provisions of the Motor Vehicle
19 Act Adopted." Should I proceed to read the--

20 Q. BY MS. PATTON: Just only that which is
21 marked. There's just one little -- right there, your
22 Honor.

23 THE COURT: Has he read what you've asked
24 him to read?

25 THE WITNESS: Do you want me to read it all?

1 THE COURT: The question--

2 MS. PATTON: Just what's underlined.

3 THE WITNESS: Just what's underlined?

4 THE COURT: The question to you is to read
5 whatever she's asked you to read. I deny the
6 objection. Go ahead and read what she's asked you to
7 read.

8 THE WITNESS: "The Motor Vehicle Act,
9 Chapter 1 of Title 41, Utah Code as amended is hereby
10 adopted as a Provo City Ordinance."

11 Q. BY MS. PATTON: Mr. Malloy, are you familiar
12 with this book?

13 A. Somewhat familiar.

14 MR. HUMISTON: State for the record that
15 she's identified the Utah Code, I believe Section 41.

16 THE COURT: Well, she hasn't identified
17 anything yet other than the book in her hand.

18 MS. PATTON: I just want to know if he
19 recognized the book. It is the Utah Code Annotated
20 Volume II, for the record.

21 May I approach again, please

22 THE COURT: You may.

23 Q. BY MS. PATTON: Mr. Malloy, would you please
24 identify and read the first marked passage on the
25 following page, 41-1A-1009.

1 MR. MCGINN: Your Honor, could I have a
2 moment to get there myself?

3 THE COURT: Yes, sir. State it again, will
4 you please, Ms. Patton?

5 MS. PATTON: 41-1A-1009.

6 THE COURT: Go ahead, sir. Do you have it?

7 THE WITNESS: I do. "Abandoned and
8 inoperable vehicles, vessels and outboard motors
9 determination by commission disposal of vehicles. 1,
10 a vehicle vessel or outboard motor is abandoned and
11 inoperable when a) the vehicle, vessel or outboard
12 motor has been inspected by an authorized investigator
13 or agent appointed by the commission, and b) the
14 authorized investigator or agent has made a written
15 determination that the vehicle, vessel or outboard
16 motor cannot be rebuilt or reconstructed in a manner
17 that allows its use as designed by the manufacturer."

18 Q. BY MS. PATTON: Are you an authorized
19 investigator or agent of the state tax commission?

20 A. I am not.

21 Q. Was the determination of inoperability made
22 in accordance with that state code?

23 A. This state code references specifically
24 abandoned and inoperable vehicles. Section 14-34-080
25 goes beyond only referencing abandoned and/or

1 inoperable vehicles. So you were cited for the
2 violation of Section 14-34-080, which in my opinion,
3 includes other areas than just being abandoned or
4 inoperable.

5 Q. So you're saying that the city code
6 overrides the state code; is that what I'm hearing you
7 say?

8 A. What I'm saying is what I specifically cited
9 you for the violation of. If you're asking for an
10 interpretation of what the City's policy is, I cannot
11 answer that.

12 Q. Does the City have a written policy for--

13 A. I'm not aware if there is or not.

14 Q. Has there been a request for the
15 determination of inoperability under that state code
16 that you--

17 A. As far as I'm aware there has not been.

18 Q. With no other definition of inoperable, has
19 this vehicle been determined to be inoperable by
20 you -- by yourself?

21 A. In my opinion, yes, it is inoperable.

22 Q. Did you ever ask the Pattons if the vehicle
23 was operable?

24 A. As I've expressed to you, prior to this date
25 I was not in a position to speak with you, nor had I

1 received any response from you to the letters that I
2 had sent to you in order to ask you in regards to that
3 specific question.

4 Q. Is the vehicle abandoned?

5 A. I would say it's more than likely not
6 abandoned.

7 Q. So your answer is no?

8 A. Correct.

9 Q. Is the vehicle licensed?

10 A. I could not see anything that would
11 reference it as being licensed.

12 Q. Does the ordinance make a distinction
13 between licensed and unlicensed vehicles, or are they
14 dealt with in this same manner?

15 A. They are not dealt with in this same manner.
16 If the vehicle is unlicensed then according to this
17 section of ordinance 14-34-080 on a residential lot a
18 maximum of two vehicles may be maintained, but each
19 vehicle must be either within a building or behind an
20 opaque screening fence. If the vehicle is operable
21 and licensed then the owner of the property is
22 required to provide legal parking for that and all
23 other operable vehicles that they own, or tenants own.

24 Q. Is the term "opaque" defined in the Provo
25 City code?

1 A. I'm not aware of whether or not opaque is
2 defined.

3 Q. Is the term "opaque" defined in the state
4 code?

5 A. I'm not aware of whether or not opaque is
6 defined in the state code.

7 Q. Is the term "opaque" defined in the policy
8 and procedure?

9 A. Is the what, sorry?

10 Q. Excuse me. Is the term "opaque" defined in
11 the city policy and procedure?

12 A. I'm not sure whether it is or not.

13 Q. Are opaque and sight obscuring the same
14 thing?

15 A. I would say that they are.

16 Q. Does the Provo City code give a height
17 requirement for an opaque screening fence?

18 A. It does.

19 Q. Does your department's policy and procedure
20 give a height requirement for an opaque screening
21 fence?

22 A. It does.

23 Q. Is non-sight obscuring defined as at least
24 50 percent open?

25 A. I'm sorry, could you repeat that?

1 Q. Yes, I surely could. Is non-sight obscuring
2 defined as at least 50 percent open?

3 A. I believe so.

4 Q. Is any fence less than 50 percent open
5 considered to be sight obscuring?

6 A. Is any fence less than 50 percent open
7 considered sight obscuring?

8 Q. Yes.

9 A. Not that I'm aware of.

10 Q. Is there a fence between the vehicle and the
11 public street?

12 A. Between this specific vehicle?

13 Q. Yes.

14 A. There is -- well, there is a gate.

15 Q. Is there a fence between the vehicle and the
16 adjoining property?

17 A. Is there a fence between this and the
18 adjoining property?

19 Q. Uh-huh.

20 A. I believe there is.

21 Q. Is the fence sight obscuring?

22 A. There are numerous fences that we need to
23 address. If we're not going to address the other
24 property, then how can I possibly describe the fences
25 that would separate the properties?

1 Q. I am referring simply to that (inaudible).

2 A. The fence that is along the front property
3 line specifically in front of the vehicle, I believe,
4 was intended to be sight obscuring. It's used as a
5 gate, but over the years the fence has continued to
6 dilapidate, and now as the photos depict, you can see
7 that many of the slats in the chain link fence have
8 either been moved or are in bad shape so that the
9 fence itself more than likely would be -- the gate
10 area more than likely would be 50 percent open.

11 Q. Was the vehicle in substantially the same
12 position? I don't think this -- oh, maybe it will.
13 Here we go. Was the vehicle in substantially the same
14 position when the zoning officers approved compliance
15 during defendant's 1994 probation for zoning
16 violations?

17 A. I did not work for Provo City at that time,
18 so I'm not aware.

19 Q. Was the vehicle in substantially the same
20 condition as -- well, I'll ask this later. Would the
21 City have had any (inaudible) authority and right
22 under the probation to bring the property into
23 compliance at defendants' expense had she not brought
24 it into compliance?

25 A. I'm sorry, I didn't follow the beginning

1 part of what you said.

2 Q. Would the City have any enforced its
3 authority and right under the probation to bring the
4 property into compliance at defendants' expense had
5 she not brought it into compliance?

6 A. What probation?

7 Q. Any probation. As an example, this type, if
8 nothing was brought into compliance, then would the
9 City enforce its right to say, "Take the trailer, take
10 the fence down?"

11 A. I believe that that is what we have
12 requested of you to either move the vehicle to another
13 place on the lot or remove it from the lot to comply
14 with Section 14-34-080.

15 Q. But the vehicle had been removed under
16 (inaudible) defendants' last guilty verdict by the
17 City if the vehicle was not in compliance at that
18 time?

19 THE COURT: Ms. Patton, I don't have an
20 objection, but I'm going to sustain it anyway.

21 My objection is that we are not here to
22 discuss matters of prior hearings and any rulings with
23 respect to whether there was a guilty or not guilty
24 verdict, as you've characterized it. Please don't get
25 into those.

1 Q. BY MS. PATTON: Has the standard for
2 determining a vehicle's compliance changed between
3 1994 and present?

4 A. I did not work for Provo City in 1994, so I
5 couldn't answer for that. In my opinion since I
6 started with Provo City in November of 1995 it has not
7 changed.

8 Q. This is a 1996 (inaudible).

9 A. That is correct.

10 Q. So my question is, in 1994 has the
11 compliance changed? Are you aware if the compliance
12 has changed?

13 A. I would need to reference the 1994 ordinance
14 and compare them to today's ordinance to know whether
15 they have changed.

16 Q. Is the property presently in violation of
17 sub section 3 of the Provo City Ordinance in Count I?

18 A. Could you show me a copy of that ordinance
19 that we're referencing at this point?

20 THE COURT: It's 14-34-080 Section 3? Is
21 that what you're talking about?

22 MS. PATTON: Uh-huh.

23 COURT CLERK: (Inaudible).

24 THE WITNESS: You said sub section 3?

25 Q. BY MS. PATTON: Yes.

1 A. Should I read that?

2 Q. You're welcome to.

3 A. "No trash, used materials, junk, household
4 furniture, appliances, scrap material, equipment or
5 parts thereof shall be stored in an open area. The
6 accumulation of more than one such item constitutes a
7 junk yard as defined in Chapter 14-06, Provo City
8 Code, and must be removed from the property, stored
9 within an enclosed building, or be properly located in
10 an M-2 zone."

11 Because I have not been on the subject lot,
12 I do not know what is in the backyard area. There is
13 a sign, as I've described before, that prohibits me
14 from going on the site to determine what is in the
15 backyard. Because I have not been on the site nor
16 seen what's in the backyard I cannot answer that
17 adequately in response to your question.

18 Q. Does the yard have trash on it?

19 A. I'm sorry, what's that?

20 Q. Does the yard have trash on it?

21 A. As I just said, I cannot determine what's in
22 the backyard area because I have not been--

23 Q. On what you have seen.

24 A. In the front yard area I have not seen it as
25 today's date. On March 19, 1996, however, there was

1 other materials that I referenced by sub section 3.
2 There were materials in the yard area.

3 Q. Does the yard have used materials in it?

4 A. When?

5 THE COURT: We're talking about 3/19/96?

6 MS. PATTON: Uh-huh, that's correct.

7 THE WITNESS: Yes, there were at that point
8 in time materials in the front yard area. Again, I do
9 not know what was in the backyard area.

10 Q. BY MS. PATTON: Is the term "used material"
11 defined in the Provo City Code?

12 A. I'm not aware of whether it is or not.

13 Q. Is the term "used material" defined in the
14 state code?

15 A. I'm not sure whether it is or not.

16 Q. Is the term "used material" defined in the
17 department's policy and procedure?

18 A. I'm not sure whether it is or not.

19 Q. Does the term relate to items used in
20 building structures?

21 A. Does the term or does the ordinance?

22 Q. Does the term (inaudible) the word material?

23 A. It may well refer to materials used for
24 construction.

25 Q. Does the term relate to previously utilized

1 fabric?

2 A. It may well reference that.

3 Q. The ordinance has a term "used material" in
4 a plural form in the ordinance violated if a singular
5 used material is present.

6 A. I'm sorry, I don't follow what you're
7 saying.

8 Q. It says, "used materials." Was there used
9 materials upon that date?

10 A. I would say, yes, there were.

11 Q. Is it possible that the used materials that
12 you alleged observed were in fact a trailer loaded
13 with junk to be taken to a landfill?

14 A. In the front yard area?

15 Q. You have two pictures, correct?

16 A. I do.

17 Q. Exhibit 1 and Exhibit 2?

18 A. Uh-huh, that is correct.

19 Q. There are some trailers that you've given
20 testimony to?

21 A. That is correct.

22 Q. Okay, my question then of those trailers, is
23 it possible that the used materials that you allegedly
24 observed were in fact a trailer loaded with junk to be
25 taken to a landfill?

1 A. That material was present and you are
2 correct, but there were other items in the yard area
3 in addition to the materials in the trailers.

4 Q. Is it a subjective judgment by the zoning
5 officer as to whether things are used materials?

6 A. In some ways I guess that it could be.

7 Q. Does the yard have junk on it?

8 A. It did.

9 Q. Is the term "junk" defined in the Provo City
10 Code?

11 A. I'm not aware of whether it is or not.

12 Q. Is the term "junk" defined in the Utah State
13 Code?

14 A. I'm not aware of whether it is or not.

15 Q. Is the term "junk" defined in the
16 department's policy and procedure?

17 A. I'm not sure whether it is or not.

18 Q. Is it possible that the junk you observed
19 was loaded on a trailer for disposal at the landfill
20 at its earliest opportunity?

21 A. Some materials were, as I said just a minute
22 ago, but there were definitely other materials in the
23 yard area that were not loaded into a trailer, and
24 were not going to be moved at the earliest convenience
25 to a site other than the residence.

1 I have no idea what your intentions were for
2 the materials since you did not contact me in response
3 to my letters, but we're talking about several months.
4 I would imagine in that time you would have had an
5 opportunity, if it was at your earliest convenience,
6 to move those in a two month period.

7 Q. Is it a subjective judgment by the zoning
8 officer as to whether things are junk?

9 A. In some ways it may be.

10 Q. Does the property have household furniture
11 on it?

12 A. I do not recall specifically whether there
13 are household -- was household furniture on the lot.

14 Q. Is lawn furniture considered to be household
15 furniture?

16 A. Lawn furniture, in my opinion, would not be
17 characteristic of the same furniture you would use in
18 your home.

19 Q. Is outdoor furniture considered to be
20 household furniture?

21 A. No, it does not.

22 Q. Is there a definition of household furniture
23 in the Provo City Code?

24 A. I'm not sure whether there is or not.

25 Q. Is there a definition of household furniture

1 in the Utah State Code?

2 A. I'm not sure whether there is or not.

3 Q. Is there a definition of household furniture
4 in the department's policy and procedure?

5 A. I'm not sure whether there is or not.

6 Q. And is it a subjective judgment by the
7 zoning officer as to whether things are household
8 furniture?

9 A. Other than common sense of what is household
10 furniture, then I would say that it is a subjective
11 issue.

12 Q. Does the property have appliances on it?

13 A. On the lot or you mean in the yard area?

14 Q. In the yard area.

15 A. I have no idea what's in the backyard area,
16 I have not seen it. I do not recall specifically what
17 was in the front yard area other than recalling that
18 there were definitely items in violation of that
19 section, Section 14-34-080 in the yard area, March 19,
20 1996. Unfortunately I did not keep a log of specific
21 items in the yard area on that date.

22 Q. Is it a yes or no answer to whether there's
23 appliances on the property as far as what you could
24 see?

25 A. As far as what I could see I don't recall.

1 Q. Does the yard have scrap material on it?

2 A. I would say yes, it did.

3 Q. Is the term "scrap material" defined in the
4 Provo City Code?

5 A. I'm not aware of whether it is or not.

6 Q. Is the term "scrap material" defined in the
7 Utah State Code?

8 A. I'm not sure whether it is or not.

9 Q. Is the term "scrap material" defined in the
10 department's policy and procedure?

11 A. I'm not sure whether it is or not.

12 Q. Is it possible that your alleged scrap
13 material was loaded on a trailer for disposal at the
14 landfill at its earliest opportunity?

15 A. I guess it is possible that some of the
16 items on those trailers were scrap material, but there
17 is still definitely other materials on the subject lot
18 at that time.

19 Q. Is it possible that your alleged scrap
20 material was new material that hadn't been used yet?

21 A. Some of it may have been that, but in my
22 opinion, there were other items on the lot that were
23 scrap material.

24 Q. Is it the subjective judgment by the zoning
25 officer as to whether things are scrap material?

1 A. In some ways, yes, it is.

2 Q. Does the yard have equipment or parts
3 thereof on it?

4 A. Equipment or parts generally? From what I
5 could see in the front yard area I would say yes,
6 under that general term. Again, in the backyard I
7 have no idea whether or not there was those materials,
8 even though the ordinance does reference any open
9 area. Because of physical limitations I could not see
10 what was in the backyard.

11 Q. Is the term "equipment" defined in Provo
12 City Code?

13 Q. Is the term "equipment" defined in Utah
14 State Code?

15 A. I'm not sure whether it is or not.

16 Q. Is the term "equipment" defined in the
17 department's policy and procedure?

18 A. I'm not sure whether it is or not.

19 Q. Is it a subjective judgment by the zoning
20 officer as to whether objects are equipment?

21 A. Whether what?

22 Q. Is it a subjective judgment by the zoning
23 officer as to whether objects are equipment?

24 A. Again, other than common sense of being able
25 to identify whether an object is equipment or not, it

1 is a subject interpretation.

2 Q. Is there open areas within the boundaries of
3 this property?

4 A. There is.

5 Q. Is the term "open areas" defined in Provo
6 City Code?

7 A. I'm not sure whether or not it is.

8 Q. Is the term "open areas" defined in Utah
9 State Code?

10 A. I'm not sure whether or not it is.

11 Q. Is the term "open areas" defined in the
12 department's policy and procedure?

13 A. I'm not sure whether or not it is.

14 Q. Is the property exposed with an opaque or
15 sight obscuring fence?

16 A. Not to the extent that it would screen the
17 materials from the public right-of-ways or adjacent
18 lots.

19 Q. Is the sight obscuring fence at least
20 (inaudible) inches in height?

21 A. I have not measured specifically how high
22 the fence is.

23 Q. If the area in question is behind the
24 screening fence, is the area an open area in this lot?

25 A. I guess anything is possible if we're

1 speaking about what-if's. In this specific situation
2 it is not enclosed, it is an open area in the front
3 yard.

4 Q. Is it a subjective judgment by the zoning
5 officer as to whether an area within a fence --
6 private yard is an open area?

7 A. This ordinance says that the junk needs to
8 be inside of a building, so anything that's not inside
9 of a building would be an open area.

10 Q. Has the defendant ever been charged with
11 violations of Provo City Ordinances before now?

12 MR. MCGINN: Objection, your Honor.

13 THE COURT: Sustained.

14 Q. BY MS. PATTON: When you first started
15 working for the zoning department approximately 17
16 months ago, were you handed an open file on Joan
17 Patton?

18 A. I do not recall whether it was open or not.
19 I was given the file, though.

20 Q. Of which you have been in (inaudible) up
21 through this 17 months?

22 A. That's correct.

23 Q. Do you have any idea how old the fence is in
24 question?

25 A. The fence on the subject lot?

1 Q. Yes, sir.

2 A. According to the information you gave me, it
3 was in 1962 that it was put in, or thereabouts.

4 Q. Is the fence in question acting as an opaque
5 or sight obscuring structure required by another Provo
6 City Ordinance?

7 A. The fence that is along the front property
8 line of the property that you own with the residents
9 on it?

10 Q. Yes.

11 A. It would not serve the purpose of being
12 opaque or screening to the extent the ordinance would
13 require to screen an inoperable vehicle.

14 Q. Have the Pattons' neighbors complained about
15 the fence?

16 A. I have not spoken to any of the neighbors
17 regarding your property.

18 Q. Does the fence pose a risk to health safety
19 and welfare?

20 A. This same fence that we're speaking about?

21 Q. (Inaudible) utilizing the public streets and
22 walks?

23 A. In my opinion probably not.

24 Q. Are certain neighbors in the city held to a
25 higher zoning enforcement standards than others?

1 A. As zoning changes there are non-conforming
2 rights that different property owners may have. In
3 that situation, yes, some are held to a different
4 standard than others.

5 Q. Are there differences in policy and
6 procedure from neighborhood to neighborhood
7 (inaudible)?

8 A. From zone to zone there are specific
9 requirements.

10 Q. Is this the only property charged with a
11 violation in this neighborhood?

12 A. With a violation in general or a specific
13 violation?

14 Q. I'm the only one that's on my street that's
15 been charged with property violations?

16 A. Period with any violation, that's what I'm
17 asking, or specifically with this--

18 Q. For a zoning (inaudible).

19 A. No, you are not.

20 Q. How many are there on the street? Do you
21 know?

22 A. I would need to check my records to see
23 historically what we have worked with since I have
24 worked in the city.

25 Q. Did (inaudible) of this property arise after

1 a citizen complaint?

2 A. I had received and have received several
3 calls from concerned residents in regards to your
4 property.

5 Q. And who would those residents be?

6 A. I don't have that information in front of
7 me.

8 Q. But you do have it on file?

9 A. That is correct.

10 Q. Was a charge levied against this property
11 because it had deteriorated to a level that existed at
12 the time prior to the charge?

13 A. I cannot really answer that. When I started
14 with the City I was given numerous cases and asked to
15 investigate those, and one such case was your
16 property. Because there had been previous work on it
17 I did browse through the existing file, but did not
18 use the material in there. I went out to the site and
19 saw an existing violation and proceeded with my action
20 as of that date in contacting you and requesting that
21 the property be brought into compliance.

22 MS. PATTON: I have no more questions for
23 the witness at this time, your Honor, but would like
24 to reserve the right to inquire the witness further.

25 THE COURT: You may.

REDIRECT EXAMINATION

BY MR. MCGINN:

Q. Officer Malloy, forget about the trailer, forget about the trailer right now on this piece of property that we're talking about. Forget it's not there. On that day we're there, on March 19, 1996, was there scrap material, junk, garbage, trash in the front yard area constituting a violation?

A. There were.

Q. Is it possible that two different zoning officers could ever at one time go out to a piece of property and one officer miss a violation?

A. I would say that would be unlikely, but it could happen.

MR. MCGINN: No further questions.

THE COURT: You may step down.

May I see the exhibits, please? Do you have them right there? Thank you.

Call your next witness, will you, please?

MR. MCGINN: Mr. Roger Gonzalez.

THE COURT: Before Mr. Gonzalez testifies, Mr. Schriner and Mr. Means?

Ms. Patton, is there a problem?

MS. PATTON: Yes, I object, your Honor.

THE COURT: Object to what?

1 MS. PATTON: I asked him discovery who the
2 witnesses would be, and Mr. Malloy said that they had
3 no witnesses, your Honor.

4 THE COURT: Well, let me address--

5 MS. PATTON: Mr. McGinn, pardon me.

6 THE COURT: Let me address that in a minute.
7 Why don't you have a seat.

8 Before we call the next witness, the case
9 that was on before you folks has been resolved for
10 some time. I want to dispose of it now so that these
11 folks can go on their way.

12 (Short recess taken)

13 THE COURT: Thank you, folks, for the
14 interruption.

15 Now Mr. McGinn, you were calling another
16 witness?

17 MR. MCGINN: Yes, your Honor, Roger
18 Gonzalez, and I believe they were objecting.

19 THE COURT: Ms. Patton, you had an
20 objection. State your objection, will you, please?

21 MS. PATTON: I did not receive any discovery
22 that Mr. Gonzalez was going to be a witness, therefore
23 I have not had a chance to prepare.

24 THE COURT: I didn't see any scheduling
25 order that said identification of witnesses.

1 Mr. McGinn?

2 MR. MCGINN: Your Honor, if I could respond
3 to that.

4 THE COURT: Go ahead.

5 MR. MCGINN: Joan Patton has come into
6 office several times. Our office has an open file
7 policy. I believe Mr. Humiston, I believe also, has
8 come in and asked for discovery. In our office if --
9 and to show them, in our file -- if they come in we'll
10 allow them to look at the file, or we just make copies
11 of everything that's in the file. We give everybody
12 everything, there should be no secrets, that's our
13 office policy and that's what we do.

14 With that, I know as Joan Patton has come in
15 several times, we do have a cover sheet. It has a
16 list of our officers that says, "Anthony Malloy, Roger
17 Gonzalez from the zoning department." Anytime they
18 come in and take a look that's there, and those are
19 the orders that we give for them for people who--

20 THE COURT: When did the defendants first
21 become aware of the name of Roger Gonzalez associated
22 in this charge?

23 MS. PATTON: Just now, your Honor.

24 MR. HUMISTON: Your Honor, every document in
25 this file was provided to me in discovery except the

1 one that Mr. McGinn is referring to. This is the
2 first we've heard about Mr. Gonzalez.

3 I appreciate they do have an open file
4 policy and (inaudible) very generous, but this issue
5 has come up and we also find out for the first time
6 that there were neighbor complaints, which issue was
7 specifically addressed at the time of pre-trial. So
8 I'm getting the impression that the open file policy
9 has been less than entirely open.

10 MR. MCGINN: They've had access to
11 everything I have and more. Joan's called me and
12 asked me for -- or Ms. Patton has called me and asked
13 me for files that community development's had that
14 I've not had in my possession, given those files to
15 her, she's been free to go through it.

16 THE COURT: Well, there's nothing contained
17 in the files with respect to identification of
18 witnesses on either side -- objection to witnesses
19 identification or objection to exhibits. That means
20 everything's been done informally.

21 MS. PATTON: Can I be heard, your Honor?

22 THE COURT: Sure.

23 MS. PATTON: The motion for the bill of
24 particulars, which we've had a hearing on, I did
25 specifically at that time ask for a witness list and

1 have not to this date been given a witness list, your
2 Honor, and I do not dispute what Mr. Malloy has
3 said -- or Mr. McGinn, I'm sorry.

4 I did in fact see everything that was in
5 that file except for the top page that I have just now
6 seen.

7 MR. MCGINN: If I may approach just to show
8 the Court--

9 THE COURT: Just a moment. Would you point
10 out for me, please, where in your bill of particulars
11 you ask for identification of witnesses?

12 MS. PATTON: I did it verbally, your Honor,
13 before Judge Howard, in which I don't have a
14 transcript.

15 THE COURT: I have your bill of particulars
16 and I have your memorandum in support of your bill of
17 particulars, and there is nothing by way of any
18 request for witnesses. I'm going to deny your
19 objection.

20 Mr. Gonzalez?

21 COURT CLERK: You do solemnly swear that the
22 testimony you are about to give in this case now
23 pending before the Court will be the truth, the whole
24 truth, and nothing but the truth, so help you God?

25 THE WITNESS: I do.

1 ROGER GONZALEZ

2 having been first duly sworn,

3 testifies as follows:

4 DIRECT EXAMINATION

5 BY MR. MCGINN:

6 Q. Sir, would you please state your name for
7 the record?

8 A. Roger Gonzalez.

9 Q. For whom do you work?

10 A. I work for Provo City, code enforcement
11 officer.

12 Q. And how long have you done that?

13 A. I have done that particular job for
14 approximately 16 months.

15 Q. Officer, I want to direct your attention to
16 March 19, 1996. Did you accompany Anthony Malloy to
17 1067 North 750 West on that day?

18 A. I did.

19 Q. Why did you do that?

20 A. I was asked to go with him just to witness
21 the violation, which he basically had been addressing.

22 Q. And when you arrived at that address what
23 did you do?

24 A. I proceeded to take the camera and take some
25 photographs of the purported violations.

1 Q. Officer, do you recognize these photos that
2 have been entered into evidence as Plaintiff's Exhibit
3 1 and 2?

4 A. I do.

5 Q. Did you take those?

6 A. I did.

7 Q. Does Exhibit 1 or Exhibit 2 show in any
8 detail the interior area of the Patton property?

9 A. It does not, it shows only the trailer,
10 which is in the driveway area.

11 Q. Would you describe for the Court what types
12 of materials you saw in the front yard area at this
13 address on that date?

14 A. I saw some debris of wood and lumber scraps
15 that were laying around throughout the vicinity of the
16 yard. I also saw some boxes -- it looked like it
17 contains either canned food or fruits and vegetables,
18 that type of thing. I saw some cardboard paper, I saw
19 some other materials that were enclosed in plastic
20 bags.

21 THE COURT: Were those items on the street
22 side of the fence or the house side of the fence?

23 THE WITNESS: They were on the house side of
24 the fence.

25 Q. BY MR. MCGINN: Were there additional items

1 Q. Is this on the sidewalk?

2 A. Yes.

3 Q. Adjacent to the property?

4 A. Adjacent to the property in front of the
5 property.

6 Q. And how far away were you from the actual
7 materials that you've just described?

8 A. I was probably five, ten feet, not very far.

9 Q. Were you able to see it clearly from the
10 sidewalk?

11 A. I was.

12 MR. MCGINN: No further questions, your
13 Honor.

14 THE COURT: Ms. Patton, do you have any
15 questions for him?

16 MS. PATTON: In the interest of time, your
17 Honor, because I was not aware and did not prepare for
18 this, I'm going to ask Mr. Humiston to question
19 (inaudible).

20 THE COURT: Well, he's not going to question
21 for both of you.

22 MR. HUMISTON: I'm going to question him on
23 behalf of Mr. Patton, but I guess she doesn't have any
24 questions prepared because we did not know about this
25 witness.

1 THE COURT: I want the record to reflect
2 that.

3 Ms. Patton, you don't have any questions of
4 this witness at this time; is that correct?

5 MS. PATTON: Not at this time, your Honor.

6 THE COURT: Mr. Humiston, your witness, sir.

7 CROSS EXAMINATION

8 BY MR. HUMISTON:

9 Q. Mr. Gonzalez, did you view the property at
10 any other time other than March 19, 1996?

11 A. I have viewed the property only as I've
12 driven by on other occasions, but not from the
13 distance.

14 Q. So as far as the materials in the yard that
15 you've just described, did you see them at any other
16 time other than March 19, 1996?

17 A. No, I have not been there since.

18 Q. So you have no evidence as far as how long
19 the materials (inaudible) or whether they're still
20 there?

21 A. I don't. I was there this morning and just
22 to -- no, not this morning -- well, in answer to your
23 question, no.

24 Q. So as far as the materials you saw on March
25 19, 1996 you indicated that there was scrap lumber.

1 THE COURT: I want the record to reflect
2 that.

3 MS. PATTON, you don't have any questions of
4 this witness at this time; is that correct?

5 MS. PATTON: Not at this time, your Honor.

6 THE COURT: Mr. Humiston, your witness, sir.

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15 you've just described, did you see them at any other
16 time other than March 19, 1996?

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18 Q. So you have no evidence as far as how long
19 the materials (inaudible) or whether they're still
20 there?

21 A. I don't. I was there this morning and just
22 to -- no, not this morning -- well, in answer to your
23 question, no.

24 Q. So as far as the materials you saw on March
25 19, 1996 you indicated that there was scrap lumber.

1 see it?

2 MR. HUMISTON: Yes.

3 (Defendant's Exhibit No. 1 received into evidence)

4 THE COURT: Mr. Humiston, anything else from
5 you, sir?

6 MR. HUMISTON: No further evidence, your
7 Honor.

8 THE COURT: Is Mr. Patton going to testify?

9 MR. HUMISTON: He is not.

10 THE COURT: Thank you very much.

11 Does the City want to be heard?

12 MR. MCGINN: Closing arguments, your Honor?

13 THE COURT: Yes, sir, closing arguments,
14 we're now in that posture.

15 MR. MCGINN: Thank you. Your Honor, there
16 has been much made of discrimination, singling out the
17 Pattons. There's no evidence of that. Anthony Malloy
18 testified that there are several violations in that
19 area that they are working on, he didn't have his
20 notes to tell them how many other violations are in
21 the neighborhood. Nobody's targeting the Pattons.

22 Officer Malloy, Officer Gonzalez went out to
23 the property, saw on March 19, 1996 that there was
24 garbage, junk, materials in the -- may I approach,
25 your Honor, they are right there.

1 THE COURT: Go ahead.

2 MR. MCGINN: They testified that from that
3 photo you can't see clearly the interior of the yard,
4 but Mr. Gonzalez was clear in that he stood on the
5 sidewalk, looked in the yard, and described the types
6 of materials; lumber that was in various bits and
7 pieces, food upon the ground that were not covered,
8 there was some questions alluding to the fact that
9 this could have been firewood, but it was not kept --
10 there is no evidence that it was kept in any sort of
11 manner, there is no evidence that it was used as
12 firewood. There was boxes, bags strewn across the
13 front yard.

14 They are clearly in violation. When there's
15 a violation that needs to be addressed. If the
16 property gets cleaned up and in five months there's
17 another violation, that violation needs to be
18 addressed.

19 We think the evidence that has been
20 presented to the Court is clear. There's only been
21 three witnesses, both Officers Malloy and Gonzalez
22 testified that the yard in question did have junk,
23 garbage, material, trash.

24 Mr. Keller for the defense testified -- he
25 testified that the whole neighborhood -- he testified

1 this was something he had only found out last week.

2 So I would submit that as far as the count
3 that remains, the State has failed to establish a
4 prima facie case of a violation, and we would rest on
5 that.

6 THE COURT: Thank you, sir.

7 MR. MCGINN: Thank you, your Honor.

8 Subjective to termination, your Honor, terms and
9 ordinances have their plain and ordinary meaning, and
10 I understand that some people may consider one man's
11 garbage is another man's treasure. But in this case
12 the evidence was clear there were wood strewn about
13 the lawn with -- uncovered that had been weathered,
14 there were paper or cartons -- cardboard cartons that
15 were overflowing, splitting, had been left out in the
16 weather, were in a weathered condition.

17 I think this clearly under the plain and
18 ordinary words used in the ordinance, 14-34-080, are
19 trash, junk, materials that are clearly in the area.

20 As far as any intent, the officer indicated
21 that he sent a letter indicating that there was a
22 violation, the letter came back from Ms. Patton
23 indicating that she didn't think there was a
24 violation.

25 As to the meaning of the vehicle, whether

1 this trailer is junk, operational, the statute that
2 was cited and read by Anthony Malloy -- by Joan Patton
3 and read by Anthony Malloy, 41-1A-1008, deals with
4 salvaged titles and selling inoperable vehicles for
5 scrap. It has nothing to do with whether a vehicle is
6 inoperable or abandoned in dealing with zoning,
7 because it's salvaged titles.

8 And whether the Court considers the
9 vehicle -- the trailer, I think that's really
10 irrelevant, because not looking at the trailer,
11 there's certainly sufficient testimony offered by two
12 witnesses that is unrebutted by anybody that there was
13 junk and materials that would fit the plain and
14 ordinary meaning of 14-34-080.

15 Submit it on that to the Court.

16 THE COURT: Thank you. From the testimony
17 provided, and from the exhibits that have been
18 received, I have difficulty in being able to determine
19 that the first part of Count I of an unlicensed motor
20 vehicle, a wrecked, junked or partially dismantled or
21 inoperative or abandoned motor vehicle was present on
22 the defendant's property.

23 Plaintiff's Exhibits 1 and 2 are really of
24 not much assistance to me to make any determination as
25 to whether the yard is in compliance or it's not.

1 All those photographs really show is a
2 residence with a bunch of material out in front and a
3 parked trailer.

4 Mr. Malloy testified that he didn't remember
5 if the trailer had flat tires on it on March 19th or
6 not, and he said he had no evidence of whether the
7 trailer was registered or whether it wasn't.

8 The second portion of the City's charging
9 offense contained in Count I is the defendant, also
10 during the time in question, stored trash, used
11 materials, junk, household furniture, appliances,
12 scrap materials, equipment or parts thereof in an open
13 area not screened from the public streets and adjacent
14 properties by an opaque wall or fence.

15 In reading the statute and hearing the
16 testimony that's been provided by Mr. Malloy and Mr.
17 Gonzalez, which is the testimony we have, and the
18 testimony of Mr. Keller that we had a rather
19 dilapidated neighborhood in which the defendants'
20 property complied in making it appear to be the same
21 as the neighborhood in question, I find that the City
22 has met its burden of proof concerning the second
23 portion of that charging information in Count I,
24 therefore I find the defendants guilty as charged.

25 From the plain and simple meaning of the

1 ordinance, so you have your record on appeal, folks, I
2 believe that the evidence has sufficiently
3 demonstrated that there are items which consist of
4 junk, stored trash, scraps of wood, deteriorated
5 cardboard boxes, and even potential food products that
6 looked like they had gone bad, from the witness'
7 testimony.

8 And with that testimony being the only
9 testimony on the record, with nothing else to rebut it
10 or to describe what it was, then the Court has only
11 one conclusion to draw, and that is is it believable
12 or is it not, and I find that the City has met its
13 proof with respect to belief.

14 The questions that came from the defendant,
15 Mrs. Patton, was it possible for these things to be
16 something else. I guess it's possible that Haley Bob
17 comet had a spaceship behind it. Probable? Probably
18 not. It's possible that all of these things were
19 meant for the burning of firewood? Possible. But
20 from the testimony I have on the record, and I have to
21 make a finding from the testimony, it's probable that
22 it was not firewood. So I find the defendants guilty
23 as charged in Count I.

24 What's your pleasure with respect to
25 sentencing? You may be sentenced today on each of

1 Now Mr. Humiston, you had something to say?

2 MR. HUMISTON: Well, your Honor, you
3 addressed my objection in advance. I certainly
4 strenuously object to any reference to the other lot
5 in relation to sentencing on this lot. Certainly, as
6 far as it's relevant, if the State is anticipating
7 another prosecution, we're back to square 1, we will
8 bring all the objections based on constitutionality
9 and various other motions.

10 But I certainly -- I agree with the Court, I
11 think you addressed our objection already that any
12 sentencing with this lot has to pertain strictly with
13 this lot.

14 THE COURT: I have no problem if Mr. Malloy
15 and the Pattons with you, sir, want to meet and
16 discuss what, if anything, needs to be done to bring
17 1067 North 750 West into compliance, and then make
18 recommendations at the time of sentencing concerning
19 that issue. I'd be happy to hear those from both
20 sides, but that's where we're going to restrict
21 ourselves.

22 MR. HUMISTON: If I respond, your Honor,
23 just to review what we've done here today, Count II
24 was dismissed and Count I, the finding was based on
25 trash that was illegally in the yard on March 19th.

1 THE COURT: I found a violation of Count I.

2 MR. HUMISTON: Right.

3 THE COURT: The violation is based upon the
4 trash that was found in the front yard, as you've
5 phrased it.

6 MR. HUMISTON: And so I understand that
7 when we, at the first sentencing, sentencing will
8 pertain to the issues as found in Court's finding,
9 specifically trash in the yard; is that correct?

10 THE COURT: My sentence will pertain to the
11 fact that the property is out of compliance with the
12 zoning because of the material that has been testified
13 to as being in the yard.

14 MR. HUMISTON: Okay, thank you.

15 THE COURT: There is nothing in the street
16 that I have found at this time that is out of
17 compliance with the ordinance.

18 MR. HUMISTON: I think we can go ahead and
19 schedule the sentencing.

20 COURT CLERK: We can set it on June 11th at
21 9 o'clock.

22 THE COURT: Is June 11th at 9 a.m.
23 acceptable to you, Mrs. Patton?

24 MS. PATTON: Your Honor, can we extend it
25 just about another week? I have a woman whose baby is

1 MS. PATTON: I did, your Honor.

2 THE COURT: Do you want to comment with
3 regard to this request?

4 MS. PATTON: I would, your Honor.

5 THE COURT: Go ahead.

6 MS. PATTON: As the Court pointed out, the
7 entire discovery process has been handled very
8 informally. In the memorandum that Mr. Malloy sent to
9 Mr. McGinn, he states that he took the pictures that
10 were entered in as evidence. This is the same
11 memorandum that mentions that Roger Gonzalez was
12 another zoning officer.

13 Mr. Romney was the attorney from Provo City
14 at my arraignment. He states on the court record that
15 I will be given "everything that we have" from my
16 verbal discovery request to the Court at the time from
17 this statement. I conclude that the terms "everything
18 in evidence, witness lists, complaints, et cetera."

19 At the pre-trial conference Mr. Malloy was
20 present, Mr. McGinn was present, I was there, Natalie
21 Zabriskie, Michael Humiston was also present. Mr.
22 Gonzalez was not present. At this conference I was
23 asked -- I asked who the complainants were, who the
24 witnesses were, and Mr. Malloy informed me that there
25 were no complainants, that he was the only one, that

1 this case originated because of an open file that he
2 had been given when he first started working for Provo
3 City.

4 Let me emphasize that Mr. Gonzalez was not
5 present, nor was his name even mentioned. Mr. Malloy
6 further lead me to believe that the pictures that were
7 in the file were taken by him.

8 On three separate occasions I scheduled
9 appointments with Mr. Malloy to come out to the
10 property and tell me what the problems were. Each
11 time Mr. Malloy arrived he came with another person,
12 an intern named Bryce.

13 At none of these meetings was Mr. Gonzalez
14 mentioned. He was not present, and I was further lead
15 to believe that Mr. Malloy had taken all the pictures
16 and was the only zoning officer involved in this case.

17 Accordingly I prepared my defense based on
18 the City only using the items they had showed me as
19 evidence, as Mr. Malloy as the sole witness. From the
20 record of the trial is this evident that I had that
21 had the trial proceeded I was lead to believe that it
22 would, the outcome would have been completely
23 different.

24 It is obvious that the only testimony that
25 allowed for the conviction was the testimony of Mr.

1 Gonzalez, and like Mr. Malloy, who had I prepared
2 cross exam questions for, I had absolutely no time or
3 opportunity to prepare any type of cross exam of Mr.
4 Gonzalez.

5 Had I known about the admission of Mr.
6 Gonzalez, the admission of the additional surprise
7 witness, I could have prepared for this eventuality.
8 By the Court allowing testimony from this surprise
9 witness, my case was unduly prejudiced, I was denied
10 due process, I was not given the opportunity to face
11 and cross question my accusers as guaranteed by this
12 judicial system. The principle of fundamental
13 fairness was compromised, and I did not get a fair
14 trial.

15 I personally did not feel that this one
16 admission was done deliberately or maliciously, nor do
17 I believe that the oversight was intention on the part
18 of the Provo City prosecutor. However, in the
19 interest of fundamental fairness, due process, and
20 opportunity to defend against accusers, I would ask
21 that this Court grant this motion for the arrest of
22 judgment at this time.

23 THE COURT: Do you want to be heard,
24 Counsel?

25 MR. MCGINN: Yes, your Honor. I believe